No. 55

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,

Petitioner,

v.

ALLEN KAISER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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Opinion Below

The opinion of the Court of Appeals (R. 58-64) is reported at 262 F. 2d 367. The opinion of the District Court (R. 45-54) is reported at 158 F. Supp. 865.

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1958 (R. 64-65). The petition for a writ of certiorari was filed on April 21, 1959, and granted on June 1, 1959 (359 U.S. 1010). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Question Presented

Whether relief benefits in the form of food and rent given by a labor union to needy strikers are subject to federal income tax where the recipients, who need not be members of the union, render no services to the union nor promise anything in return for the strike relief.

Statute Involved

Internal Revenue Code of 1954.

Sec. 61. *Gross Income Defined.*

(a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

Sec. 102. *Gifts and Inheritances.*

(a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

Statement

Respondent Allen Kaiser went to work for the Kohler Company of Sheboygan, Wisconsin in 1952 (R. 24). In 1953, the Kohler Company signed a contract with the United Automobile Workers and its Local 833 (R. 14) under which Local 833 had the bargaining rights at the Kohler Company plant (R. 26). When the contract expired on March 1, 1954 (R. 16) and the Company and Local 833 were unable to agree on a new contract, a special membership meeting was called for the purpose of taking a strike vote (R. 26). At this special meeting, held on March 4, 1954 (R. 16), an overwhelming majority of those present voted by secret ballot in favor of the strike (R. 26). Nevertheless, while the members of the Local were very desirous of striking at that time, representatives of the International Union persuaded them to continue working and to try to iron out their differences with the Kohler Company around the bargaining table (R 29, 38). Finally, however, on April 5, 1954, after working a month and five days without a contract, the members of the Local "decided they weren't getting anywhere; they had to take some other action, and took strike action" (R. 38).[1]

[1] The International Union, although it had restrained the strike as long as it could, finally approved the strike (R. 46) pursuant to the provisions of the International Constitution (R. 17). The Government's brief (p. 14), treating "the International as the only 'union' involved" because the bulk of the strike relief came from the International, repeatedly states that respondent's striking was "at the request of the union itself" (p. 8), "at the request of the union" (p. 9), "at the request of the union itself" (p. 22). But the fact is that the strike was most assuredly not called at the request of the International and was not for its benefit; the strike was called by a secret ballot of the members of the Local for their own benefit.

Respondent Kaiser was not a member of the UAW Local, but he went out on strike with the others. Since he had no other job at the time and no income from any source (R. 24), he was in need of assistance for food and rent and he went down to the union headquarters to apply for strike relief (R. 24). In accordance with union policy (R. 21-23), the counsellors at union headquarters questioned him as to whether he had any independent source of income (R. 25). On finding that respondent was actually in need, he was given a weekly food voucher for $7.50, which he could use at "some store in Sheboygan" (R.25) and the union began paying his rent of $9.00 a week (R. 25) in order to forestall his eviction (R. 26). He received no cash whatever (R. 25). The amount of relief depended upon the applicant's marital status, number of children, bank account, other resources or income, number of employed persons in the family and availability of relief from community agencies (R. 22, 23, 25, 26, 29, 30, 47). Respondent's strike relief, valued at $16.50 a week, was predicated on his having no bank account, no income, no job, no dependents, and no community assistance (R. 24, 25). The $16.50 strike relief bore no relation to his prior earnings at the Kohler Company which were in the neighborhood of $100.00 a week (R. 4, 14, 61).

As the court below stated, *when respondent "received his assistance, he neither gave nor promised anything in return"* (R. 59). Respondent was not required to serve on picket lines, help in the soup kitchen or render any service whatever in order to receive strike relief (R. 26, 27, 30, 31, 48, 59). Indeed, the union counsellors who found him in need and approved his food vouchers and rent payments had no way of knowing whether respondent or any other employee on strike performed any strike services (R. 30, 31). Although no one asked respondent to become a member of the union, he did so on August 19, 1954, three

and one-half months after commencement of his relief benefits (R. 24); because he was on strike, he was not required to and did not pay any initiation fees or dues (R. 24).

The strike relief received by respondent came largely from the International Union's strike fund (R. 20), which had been accumulated by allocating to that fund 25 cents of the monthly per capita dues of $1.25 paid into the International Union for each member of each Local Union (R. 18). In addition, UAW locals and those of other unions, fraternal organizations, businessmen and others who were friendly to the cause of the Kohler strikers, also made contributions for strike relief (R. 29, 31, 59). Less than one percent of the strike relief came from the Local's own funds (R. 20).

Respondent started receiving strike relief on May 4, 1954 and received it throughout the remainder of 1954, the tax year in question. The total value of respondent's 1954 relief in food vouchers and rent payments amounted to $565.54 ($16.50 per week for 8 months). The respondent did not include this $565.54 in his 1954 return. The Commissioner of Internal Revenue determined that this amount was includible and imposed an additional tax of $108.00 (R. 4; 13, 19, 59). Respondent paid this additional tax and sued for refund in the United States District Court for the Eastern District of Wisconsin (R. 1-3).

After the evidence on the foregoing points was presented, the District Court submitted to the jury the question: "*Were the payments made to plaintiff . . . a gift?*" (R. 45). The Court charged the jury that to constitute a gift the "payments" must have been "intended to be gratuitous, without either legal or moral obligation to make the payments and without expecting anything in return" (R. 42). The jury, in a special verdict, found the strike relief received by respondent to have been a gift and judgment was accordingly entered for respondent (R. 45). Three

months later, however, upon motion of the Government, the Court set aside the verdict and entered judgment for the Government (R. 55-56), holding that "as a matter of law the strike benefits constituted taxable income and not a gift" (R. 50). The Court of Appeals reversed and held (Judge Knoch dissenting) that: (1) "*The strike benefits received by plaintiff under the facts of this case are not taxable income*" and (2) "*in any event, the strike benefits received by plaintiff were gifts which are expressly excepted from taxable income by § 102, Internal Revenue Code of 1954*" (R. 60-61).

Summary of Argument

I

This Court should affirm the decision below upon the basis of the jury verdict or upon the doctrine of equal tax treatment, either of which grounds avoids the necessity of resolving fundamental statutory questions regarding "income" and "gift." The Government would require this Court to solve broad definitional questions concerning the nature of taxable "income" and tax exempt "gifts." But the issue of strike relief is too special and atypical a vehicle to provide the occasion for redefining such general concepts. Two more limited grounds of decision are here available—first, the jury finding upon instructions unassailed by the Government that respondent's relief benefits constituted a gift, and second, the doctrine of equal tax treatment applied in the light of the Government's inability to distinguish strike relief from the most analogous categories of nontaxable social security and public and private relief benefits.

A. The jury's verdict of gift upon instructions unassailed by the Government is dispositive of this case. The District Judge gave instructions to the jury on the issue of gift which were, if anything, unduly favorable to the Govern-

ment. In any event, the Government takes pains to demonstrate here the correctness of the criteria for gifts which were the basis of the instructions to the jury and upon which that jury found against the Government. While the Government asks this Court for a strike relief determination permitting the Commissioner "to adopt a uniform rule for administrative purposes", this Court cannot establish a principle predicated on factual assumptions directly contrary to those found by a jury upon instructions more than favorable to the Government.

B. An alternative narrow ground for affirmance is provided by the doctrine of equal treatment, since the most analogous social security and public and private relief benefits are not subject to tax. In this case the Commissioner has, for no apparent reason, departed from the principle of equal treatment of those similarly situated.

(i) The Commissioner has long held that social security benefits are nontaxable. We submit that if old age, unemployment and similar benefits under the social security system paid as a matter of right and based upon an employee's previous earnings are not taxable, then strike benefits furnished only upon the basis of need and completely unrelated to the individual's earnings are even less properly subject to the tax. Indeed, the Commissioner's obvious departure from the principle of equal treatment is highlighted by the remarkable shift in the Government's effort to distinguish strike relief from social security. In the Commissioner's 1957 ruling on strike relief, it was stated that social security was freed from tax "because it was believed that Congress intended that such benefits be not subject to tax." This argument has now been completely abandoned and replaced by a contention that, unlike strike relief, social security benefits are charitable in nature. But the very face of the social security law and its ample legislative history utterly

refute the Government's contention that social security benefits are charitable in nature. In any event, there is certainly far less of a charitable foundation for social security, paid under legal compulsion without a need standard and in the form of cash, than there is for strike relief provided gratuitously by the union only upon the basis of need and in the form of bare subsistence food and rent benefits rather than cash.

(ii) Application of the doctrine of equal treatment is also called for by the fact that there is no category of relief benefits, with the sole exception of strike relief, which the Commissioner has ever sought to subject to the tax. Thus, public assistance payments, Red Cross aid, employer relief and rehabilitation payments and the like have all been ruled by the Commissioner not to constitute taxable receipts.

The jury verdict approved by the decision below and the Government's total inability to demonstrate why strike relief should be taxed when social security and public and private relief has never been taxed, provide alternative grounds for affirmance without resolution of troublesome statutory "income" and "gift" contentions.

II

Strike relief receipts are not "income" under the Code. The Government's argument to the contrary rests upon the erroneous proposition that this Court's decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, held every species of receipts "gross income" under the Code. But this Court has never held, either in *Glenshaw Glass* or elsewhere, that all receipts constitute realized "gains, profits or income" within the meaning of the Code.

A. The legislative history of the income tax statute, this Court's decisions and the Commissioner's rulings all dem-

onstrate that many categories of receipts do not constitute gross income. The first Income Tax Act under the Sixteenth Amendment carried over the previous rulings and legislative history which had imposed historical limitations on the concept of income. A series of subsequent decisions by this Court has held various categories of receipts such as alimony, unrealized advances in value, life insurance proceeds, etc., not to constitute taxable income. Finally, the Commissioner himself has adhered to his early ruling that "gross income does not include everything that comes in." Rulings rendered before *Glenshaw Glass* but unaltered since, as well as rulings rendered after *Glenshaw Glass*, recognize as nontaxable: old age, unemployment, and public relief benefits under the social security system; Panama social security payments; Red Cross aid; personal injury damages; damages for breach of promise to marry and wrongful death; payment to war prisoners for mistreatment by the enemy; rehabilitation payments to employees; Nazi persecution indemnities; meals and lodging and moving expenses provided to employees; premiums paid on employee group life insurance; and farmer consumption of his own produce. Such rulings by the Commissioner speak eloquently against the proposition the Government advances here that all receipts necessarily constitute gross income under the Code. The Government having attempted no showing, aside from its misinterpretation of *Glenshaw Glass*, that the court below erroneously regarded strike relief as not income, the burden of defending that ruling has not been shifted to the respondent; yet we are also able to assume that burden and to demonstrate the eminent correctness of the holding below that strike relief does not constitute income under the Code.

B. Subsistence relief to needy strikers is in the area of merely alleviative receipts, which have never been deemed

to constitute "income" There appears to be a common denominator to the types of receipts most analogous to strike relief which have been ruled not to constitute taxable income—social security retirement, unemployment compensation, public relief, Red Cross aid, reparation payments, damage recoveries, and the like. The subtle but vital distinction between these nontaxable receipts and those which constitute taxable "gains, profits or income" is best characterized by the element of "*enrichment*." Unlike the windfall profit in *Glenshaw Glass*, receipts which are merely alleviative, serving as reparation for loss, hardship, injury or distress suffered by the recipient, do not fall within the concept of income either in its ordinary or historical import. The same element of alleviation is also apparent in this Court's "non-income" rulings with respect to alimony payments for the loss of support by the husband, life insurance receipts representing "a substitution of money value for something permanently lost," and a "gain" upon repayment of a loan in foreign currency whose overall use resulted in a net loss to the taxpayer. *Gould* v. *Gould*, 245 U.S. 151; *United States* v. *Supplee-Biddle Hardware Co.*, 265 U.S. 189; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U.S. 170.

If merely alleviative receipts do not represent income under the Code, certainly strike relief falls within the suggested common denominator. By no stretch of the imagination does bare subsistence relief to strikers and their families constitute any enrichment or profit. Under these circumstances, and especially since the Government has not even attempted an argument (other than its misreading of *Glenshaw Glass*) in support of its view that strike relief constitutes taxable income under the Code, it is submitted that the ruling below should be affirmed on the "income" issue.

III

Strike relief constitutes a gift to the needy.

A. The recipient of strike relief renders no service or obligation for the receipt of his subsistence benefits; neither striking nor payment of dues constitutes consideration for the receipt of strike relief benefits. The Government urges that the act of striking in response to an International Union "request," creates a causal relationship which requires the conclusion that strike benefits are compensation "for" striking. But the Government's conclusion that strike relief is compensation for an act requested by the International Union—going on strike—necessarily collapses with its faulty premise that the donor union requested the strike, for the strike was neither called at the request of nor for the benefit of the International Union. Moreover, since strike relief is not paid to all strikers but only to those in need, it cannot properly be deemed to constitute compensation for striking rather than relief to the needy. Finally, the fact that strike relief is discontinued when an employee finds temporary even though less remunerative employment elsewhere, that the amount of relief dispensed is too minimal to constitute any serious incentive to remain on strike, and the fact that distributions are made alike to members and nonmembers of the union, all reinforce the charitable rather than remunerative nature of subsistence benefits furnished to needy strikers and their families.

Nor is strike relief conferred, as the Government would have it, as a *quid pro quo* for the payment of union dues. While the Government urges that the union constitution contains a "contractual obligation for the furnishing of strike relief", analysis of the constitutional provision here involved demonstrates that it is in no sense contractual, and the Government itself concedes that it does not constitute an enforceable obligation. Furthermore, the Gov-

ernment also concedes that "payment" on a "contractual obligation" itself assumed as a gift rather than for consideration, will not defeat gift. It is forced therefore into an argument that *union dues* constitute "consideration" for the "obligation" to furnish strike relief; but clearly this *quid pro quo* argument is without merit. There is no relationship whatever between the quantum of dues paid and strike relief received. Respondent, for instance, never paid any dues at all prior to receiving his strike relief benefits. It is thus clear that the Government's argument that strike relief is paid as a return "for" the payment of union dues is as fallacious as its argument that strike relief is compensation "for" striking. Under these circumstances since strike relief is received gratuitously, the recipient thereof is entitled to claim the gift exemption on his subsistence food and rent benefits.

B. Contrary to the Government's alternative argument, donor expectation of return economic advantage would not defeat the gift status of strike relief gratuitously received. This Court's decisions make perfectly clear that gratuity and gratuity alone constitutes the test of gift under the Code. *Bogardus* v. *Commissioner*, 302 U.S. 34; *Helvering* v. *American Dental Co.*, 318 U.S. 322. Subsequent decisions of this Court and of lower courts, as well as rulings by the Commissioner himself, have adhered to the position that a donor's motivation of business self-interest does not defeat the gift exemption if the benefit conferred was received gratuitously.

Even if donor motivation were accepted as a test of gift, it is clear on the record here presented that strike relief is not granted by the International Union from motives of economic self-interest. Strike relief is not a covert form of furthering the business interests of the International but precisely what it purports to be—sub-

sistence relief to needy strikers and their families bestowed out of charitable considerations. Indeed, the jury so found; and the factual premises of the Government's gift arguments thus necessarily fly in the face of the record and the appropriate findings of fact by the jury and the court below.

ARGUMENT

I

This Court Should Affirm the Decision Below Upon the Basis of the Jury Verdict or Upon the Doctrine of Equal Tax Treatment, Either of Which Grounds Avoids the Necessity of Resolving Fundamental Statutory Questions Regarding "Income" and "Gifts"

In a direct attack upon the ruling of the court below, the Government would require this Court to resolve federal income tax fundamentals on two broad and sensitive fronts. In the area of what constitutes "income", the Government is asking this Court to hold that a receipt of any type, no matter from what source or how realized, constitutes taxable "income". (Gov. Br. pp. 11, 40; see *infra*, Point II, p. 27.) In the area of what is a "gift", the Government is asking this Court to impose new and far-reaching restrictions and limitations on that statutory concept. (Gov. Br. pp. 26-31; see *infra*, Point III, p. 37.) We question, however, whether this Court will be willing to resolve definitional issues regarding "income" and "gift", particularly where the Government is asking the Court to lay down rules which the Commissioner himself has not followed in practice and does not follow today. For example, the Government asks this Court to promulgate a rule that no receipts whatever are excepted from the concept of "income" in the absence of a specific statutory exemption, although the Commissioner himself has in numerous decisions construed

the Code in a manner contrary to such a rule. See *infra*, pp. 27-32.

There is additional reason why this Court will want to avoid the broad definitional resolutions the Government seems to desire in this case—*the issue of strike relief is too special and atypical a vehicle to provide the occasion for redefining such general concepts as "income" and "gift"*. Here is a special type of relief benefit, totally unlike payments made by employers or payments incidental to other normal commercial relationships to which such tax definitions are normally pertinent. The fact that this is the first case involving the taxability of strike relief which has ever come before the courts gives emphasis to its inappropriateness as the occasion for a redefinition of basic income tax concepts.

Two limited grounds of decision short of the troublesome "income" and "gift" issues are at hand for the resolution of this case. First, the jury found in a special verdict upon instructions unassailed by the Government, that respondent's relief benefits constituted a gift. Second, the Government is wholly unable to distinguish strike relief from the most analogous categories of social security and public and private relief benefits, all of which have been authoritatively ruled not to constitute taxable income, a circumstance calling for invocation of the principle of equal tax treatment. We take up these two limited grounds of decision in order.

A. *The Jury's "Gift" Verdict, Rendered Upon Instructions Unassailed by the Government, Is Dispositive of This Case.*

The District Court, upon instructions unchallenged by the Government, submitted to the jury the question whether the amounts received by the respondent were a gift, and the jury answered the question in the affirmative. No error

in the instructions is alleged and the verdict was clearly supported by the evidence. The Court of Appeals so held and accordingly reversed the District Court's action setting aside the verdict (R. 61-62).[2] We submit that the Court of Appeals was correct in deeming the characterization of strike relief benefits as "gift" to depend upon reconciliation of facts appropriately within the province of the jury.

The District Judge instructed the jury that in determining whether the strike relief given respondent constituted a gift, it should decide whether benefits were granted "to pay for services" or merely "to show good-will, esteem or kindliness toward the plaintiff" (R. 42). He also directed the jury to consider whether the payments were "intended to be gratuitous, without either legal or moral obligation" (R. 42), and whether the payments were bestowed only because of "personal regard or pity or from general motives of philanthropy or charity" (R. 43).

In our view, these instructions were too favorable to the Government in permitting donor motivation, in the absence of consideration furnished by the donee, to defeat the gift status of benefits gratuitously received (see *infra*, pp. 46-54). In any event, the Government takes pains to demonstrate in its brief (pp. 26-31) the *correctness* of these criteria, which look to the motivation of the donor as the test of a gift, and upon which the jury found against the Government. Clearly, a litigant who emphasizes here the correctness of instructions below which were more than favorable to him, can hardly complain of the jury verdict predicated thereon.

In his instructions to the jury, the District Judge had stated that "whether the receipts were gifts is primarily

[2] This Court stated in *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958): "'proper decision of the controversy depends upon a question of fact' and therefore 'we adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of 'circumstances which admit of different interpretations.'" See also *Pearifoy* v. *Commissioner*, 358 U.S. 59 (1958).

a question of fact to be resolved under the peculiar circumstances of this case" (R. 42). In so doing, the District Court followed the views of this Court, stated in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949):

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them . . . It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design."[3]

In *Peters* v. *Smith*, 221 F. 2d 721, 725, a District Judge had set aside a jury verdict that a retirement annuity purchased by an employer for an employee was a gift. The Third Circuit reversed, Judge Hastie, speaking for the Court of Appeals, stating:

> "As we view the record, the employer in providing the questioned payments did not indicate unequivocally whether such action was intended as additional compensation for past services, or merely as an expression of a philanthropic attitude, or as a bid for employee good will, or as some combination of these. Therefore, 'it was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct.' See Brandeis, J., in *Bogardus* v. *Commissioner, supra*, 302 U.S. at page 45."

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[3] Questions of motive bearing on tax issues have been considered questions of fact. See, e.g., *Crossley* v. *Campbell*, 184 F. 2d 639 (7th Cir. 1950); *Lannan* v. *Kelm*, 221 F. 2d 725 (8th Cir. 1955); *United States* v. *Fewell*, 255 F. 2d 496 (5th Cir. 1958); *Keefe* v. *Cote*, 213 F. 2d 651 (1st Cir. 1954); *Jones* v. *Griffin*, 216 F. 2d 885 (10th Cir. 1954). The Commissioner recently acquiesced (C.B. 1958-2, 8) in a Tax Court determination that the issue of gift "is one of fact." See *J. Marion Wright*, 30 T.C. 392 (1958).

The Government contends in the face of the conclusive jury finding, that "it is essential as a practical matter" that the question of gift be here treated as one of law on the ground that "it is obviously necessary for the Commissioner to adopt a uniform rule for administrative purposes" (Gov. Br. p. 51). But this Court cannot establish a principle of law predicated on factual assumptions directly contrary to the facts found by a jury upon instructions more than favorable to the Government. Possibly the Government is asking this Court to close its eyes to the jury's unassailed findings; possibly it is asking this Court to formulate generalizations bearing only on future strike relief cases whose facts may differ from those in the present case. We cannot believe that this Court will follow either course.

In seeking to avoid the force of the jury finding by insisting upon "a uniform rule for administrative purposes," the Government is apparently asking this Court to declare that no strike relief under any circumstances can ever be held a gift. The jury's finding of gift on unassailed instructions highlights the difficulties inherent in the Government's insistence upon a uniform rule. In the instant case the jury may well have considered, and quite properly so, the fact that respondent was not even a member of the union when he was found eligible to receive strike relief. Certainly another consideration in determining the "gift" issue in any particular strike relief case is the source of the benefits involved. Thus, in the instant case the bulk of the relief funds involved did not come from the local union which had initiated the strike, but rather from the International Union. In still other cases strike relief funds come from outside unions, friends of labor and even the public at large.

For example, where a union is new or in need of assistance, most or all aid must ordinarily come from outside

sources—not necessarily from organized labor. In the early history of the UAW it required just such outside assistance. The National Committee to Aid Families of General Motors Strikers, Inc., collected money from individual donors, independent of any labor union, for the assistance of needy UAW strikers.[4] This assistance was the subject of a ruling dated February 13, 1946, which is reproduced in Appendix A to this Brief, *infra*, p. 60. The ruling holds that donations by individuals to this Committee are deductible by the donors as charitable "gifts".[5]

In the recent steel strike many labor organizations made substantial contributions to relieve the distress of the steel workers. The United Automobile Workers gave $1,000,000; the Industrial Union Department of the AFL-CIO $1,000,000; the Amalgamated Clothing Workers of America $1,000,000; the Communication Workers $100,000 (and pledged an additional $100,000 for each month of the strike); the Electrical, Radio and Machine Workers $100,000; the Textile Workers $100,000; the Building Service Employees $100,000; the Retail Clerks $100,000; the Railroad Workers (4 unions) $100,000; the Newspaper Guild $25,000; the National Maritime Union $10,000; the Utility Workers' Organization $25,000; the Commercial Telegraphers $15,000; the Transport Workers $25,000; and the Pulp-Sulphite Workers $10,000. See Proceedings, Third Constitutional Convention, AFL-CIO (9-17-59) p. 25; (9-22-59 morning) p. 70; *AFL-CIO News* (10-3-59) p. 3; (10-17-59) p. 1; (10-24-59) p. 1; (10-31-59) p. 3. The American Federation

[4] In the long drawn out 1949 strike against the Smoot Sand and Gravel Company of the District of Columbia, a "Committee of Citizens" raised funds to give relief to strikers' families. This Committee was revived in the 1958 strike against the same company and again provided relief to the strikers. See the *Washington Post and Times Herald*, October 7, 1958.

[5] Obviously donations by this Committee to relieve needy strikers were equally exempt as gifts and the Government so concedes (Br. 25, n. 13).

of Government Employees made a contribution of an unpublished amount. *Government Standard* (11-20-59) p. 2. A labor organization in Israel gave $10,000. *The Wall Street Journal*, September 8, 1959. Upon individual solicitation at plant gates, the workers at a Chevrolet plant donated $2,100; those at a Ford plant $1,500. *AFL-CIO News* (10-10-59) p. 3. The Colorado Springs Trades Council contributed groceries of a value of $1,000 donated by grocery stores, churches and union members. *AFL-CIO News* (10-24-59) p. 3.

The highly significant differences between strike relief conferred from various sources under varying circumstances and conditions underline the wisdom of this Court's adherence to its policy of case by case determination and the impossibility of substituting some "uniform rule" for the jury verdict. The jury having determined upon instructions the Government deems to be correct that the strike relief here in issue constituted a gift to respondent, the ruling below should be affirmed on this clear and narrow ground.

B. *Affirmance Is Required by the Doctrine of Equal Treatment, Since the Most Analogous Social Security and Public and Private Relief Benefits Are Not Subject to Tax.*

Congress spends a great deal of its time eliminating discrimination in tax treatment between taxpayers similarly situated.[6] "A cardinal principle of Congress in its tax

[6] Only a few recent examples need be cited. In the Technical Amendments Act of 1958, 72 Stat. 1606, a number of provisions were expressly designed to accomplish just this purpose. See sections 28, 65 and 93 of the Act, explained in S. Rep. No. 1983, 85th Cong., 2d Sess., 42-44, 158-159, 89-90, 226-27, 106-107 and 240-242. The Ways and Means Committee has been holding recent hearings on tax reform to seek, in the words of Chairman Mills, "greater equity through closer adherence to the principle that equal income should bear equal tax liabilities." Vol. 1, Tax Revision Compendium submitted to Committee on Ways and Means, p. ix (1959).

scheme is uniformity, as far as may be." *United States* v. *Gilbert Associates*, 345 U.S. 361, 364 (1953). This Court has on numerous occasions exerted its power to prevent frustration of the Congressional scheme of uniformity. See e.g. *Commissioner* v. *Sullivan*, 356 U.S. 27, 29 (1958); *Libson Shops Inc.* v. *Koehler*, 353 U.S. 382, 389-90 (1957); *Haynes* v. *United States*, 353 U.S. 81, 84 (1957); *United States* v. *Gilbert Associates*, 345 U.S. 361, 364 (1953); *Lyeth* v. *Hoey*, 305 U.S. 188, 194 (1938). The Treasury Department, likewise, recognizes that similarly situated taxpayers should receive equal treatment.[7] Yet the Commissioner has departed from the principle of equal treatment in the instant case for no apparent reason, compelling or otherwise.

(i) The Commissioner has long held that social security benefits are nontaxable.[8] Recently the Commissioner expanded that position by ruling that sickness, maternity, disability, old age and death benefits paid by the Republic of Panama "do not constitute taxable income . . . for Federal income tax purposes." Such benefits were "deemed to be basically similar to the sundry insurance benefit payments made to individuals under the United States social security system."[9]

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[7] For instance, on December 4, 1959, Jay W. Glasmann, Assistant to the Secretary of the Treasury, stated that it was a "basic" concept "of a sound tax system" that "taxpayers who are similarly situated should be treated alike." Address to Symposium of the Tax Institute Incorporated.

[8] T. D. 6272, Section 1.61-11(b), C.B. 1957-2, 18, 30; I.T. 3447, C.B. 1941-1, 191 (retirement benefits); I.T. 3194, C.B. 1938-1, 114 (lump-sum benefits); I.T. 3229, C.B. 1938-2, 136 (lump-sum death benefits); I.T. 3230, C.B. 1938-2, 136; Rev. Rul. 55-652, C.B. 1955-2, 21 (unemployment compensation). The exclusion of Social Security retirement benefits from tax was referred to by the Ways and Means Committee and the Senate Finance Committee as "existing law". H.R. No. 1337, 83d Cong., 2d Sess., 7; S. Rep. No. 1622, 83d Cong., 2d Sess., 8.

[9] Rev. Rul. 56-135, C.B. 1956-1, 56. This is another example of a situation where the Commissioner applied the doctrine of equal treatment.

We submit that if old age, unemployment and similar benefits under the social security system are not taxable, strike relief based on need is an *a fortiori* case. Nontaxable social security retirement and unemployment benefits are paid as a matter of right in an amount which is based upon and arises because of the employee's previous earnings, and is generally intended to compensate for loss of livelihood because of retirement or unemployment. Thus, even if strike benefits were paid as a matter of right, they would still not be taxable under the social security analogy. Surely, then, strike relief furnished not as a matter of right, but upon the basis of the need of the individual recipient and his family, and completely unrelated to the individual's former earnings, is even more remote from taxable income. Moreover, social security retirement benefits are paid from a fund which is derived from contributions of employers and employees, whereas the strike relief in this case was given to respondent from a fund to which neither he nor any employer made any contribution.

The Commissioner's obvious departure from the principle of equal tax treatment is highlighted by a remarkable shift in the Government's effort to distinguish strike relief from nontaxable social security benefits. In the Commissioner's 1957 ruling holding strike relief taxable, he distinguished social security benefits on the ground that "the benefits in these cases were held not to constitute taxable income because it was believed that Congress intended that such benefits be not subject to tax." Rev. Rul. 57-1, C.B. 1957-1, 15, 16. But neither the Commissioner nor anyone else has ever found anything in the social security law or its legislative history which even hints at such a Congressional intention and the Government has now totally abandoned the Commissioner's specious distinction. Instead, the Government now seeks in this Court to distinguish social security payments from strike relief on a ground never even suggested

by the Commissioner—on an *ipse dixit* that social security payments are charity and strike relief is not (Gov. Br. p. 10). But, if anything, the situation is clearly the reverse; for as the statute and its legislative history make clear, old age and unemployment payments were never intended to be and are not charity, while strike relief clearly is charitable in nature.[10]

When the Social Security Act was first enacted, the House Ways and Means Committee expressly stated that the purpose of old age and survivors' insurance benefits was "to assure support for the aged as a right rather than as public charity, and in amounts which will insure not merely subsistence but some of the comforts of life." H. Rep. No. 615, 74th Cong., 1st Sess., 5 (1935); see also S. Rep. No. 628, 74th Cong., 1st Sess., 7 (1935).[11] Indeed, under the old age and

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[10] The Government defines charity in a "special sense," for this occasion, as "a concern for the public good, untainted by motives of private advantage" (Br. 10, n. 1a). We confess our inability to understand how this definition converts retirement and unemployment benefits under the federal social security system into charitable gift, unless every disbursement by the United States is charity in a "special sense," since all disbursements are assumed to be for "the public good." Indeed, viewing as does the Government in its brief, the "donor" of social security as the United States, it is also perfectly clear that there is tangible "advantage" to the United States flowing from the stabilizing influence of the social security system, which was a primary purpose of its enactment.

[11] After the old age and survivors' insurance system had been in operation a number of years, the Ways and Means Committee, in discussing the bill which became the Social Security Act Amendments of 1950, commented: "Because benefits under the insurance system are paid as a matter of right following cessation of substantial covered employment, the worker's dignity and independence are preserved . . . Because benefits are geared to contributions, the pressure for an unwarranted scale of payments is held at a minimum." H. Rep. No. 1300, 81st Cong., 1st Sess., 2, 3.

In 1954, the Ways and Means Committee stated: "The knowledge that benefits will be paid irrespective of whether the individual is in need supports and stimulates his own thrift and initiative, since he can add his personal savings (including home ownership and insurance) as well as pensions he may receive as a result of his work, to the basic old-age and survivors insurance benefits." H. Rep. No. 1698, 83rd Cong., 2d Sess., 2.

survivors insurance system, employers, employees and the self-employed pay the taxes from which the retirement benefits are derived. See 42 U.S.C. § 401. The United States does not contribute. Benefits are geared to covered wages or self-employment income,[12] so that the system is financially sound.[13] If taxes are not paid with respect to an individual's earnings because he is not covered under the system, he is not entitled to benefits regardless of his need.[14] An eligible individual receives retirement benefits even if he has an enormous investment income. Clearly then, social security retirement benefits do not constitute charitable gratuities.[15]

So also, unemployment benefits are paid as a matter of right without reference to need or to other sources of income.[16] The Report of the House Committee on Ways and

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[12] Social Security Act, Sections 202, 215, 42 U.S.C.A. Section 402, 415. See *Social Security Board* v. *Nierotko*, 327 U.S. 358, 361 (1946).

[13] For latest statements, see H. Rep. No. 2288, 85th Cong., 2d Sess.; S. Rep. No. 2388, 85th Cong., 2d Sess.

[14] See *United States* v. *Silk*, 331 U.S. 704, 710-711 (1947); 42 U.S.C. § 403(b), (c), (e).

[15] The Commissioner placed under Section 61(a) of the Code the portion of the Regulations which hold social security retirement benefits nontaxable. See Section 1.61-11(b), C.B. 1957-2, 18, 30. Generally, a regulation is inserted under the provision of the code which it is intended to interpret. See Reg. 118, Explanation of Regulations. Ordinarily, if the Commissioner excludes a receipt from income because it is a gift, he so states. See Rev. Rul. 56-610, C.B. 1956-2, 25 (state bonus to veteran held to be a gift); Rev. Rul. 57-233, C.B. 957-1, 60 (grant by United States to certain Indians for relocation and vocational training held to be a gift). The Government's belated effort to explain the nontaxability of social security payments as charitable gratuities is thus defeated by the very placement of the nontaxability ruling in the Regulations.

[16] As stated in the comprehensive discussion by Burns, "Unemployment Compensation and Socio-Economic Objectives," 55 Yale L. J. 1, 2:

> "unemployment compensation makes cash payments to unemployed workers as a right under more or less clearly defined conditions which do not include, however, the requirement that the recipient undergo a test of need."

Means relative to the Social Security Act (H. Rep. No. 615, 74th Cong., 1st Sess., p. 7) made clear that no need element inheres in the unemployment compensation scheme:

> "Unemployment insurance cannot give complete and unlimited compensation to all who are unemployed. Any attempt to make it do so confuses unemployment insurance with relief, which it is designed to replace in large part. . . . Unemployed workmen who cannot find other employment within reasonable periods will have to be cared for through work relief or other forms of assistance, but unemployment compensation will greatly reduce the necessity for such assistance. Unemployment compensation is greatly preferable to relief because it is given without any means test. It is in many respects comparable to workmen's compensation, except that it is designed to meet a different and greater hazard." [17]

It is clear, therefore, that the Government's attempted "charity" distinction of the social security rulings is without substance. But even were the Government correct in its designation of social security benefits as charitable in nature, that would not provide any cogent distinction between social security and strike relief, for the latter is no *less* charitable than the former. Certainly there is no

[17] Unemployment compensation, ordinarily derived from employer payments, highlights the inconsistency of the Government's position. Some states, New York for example, allow unemployment compensation to strikers. New York Labor Law, § 592. Suppose an employer operates plants both in New York City and across the state line in Stamford, Connecticut, and the union calls a strike. On the Government's theory the striker who receives unemployment compensation in New York on the basis of right and in an amount directly related to his prior earnings is not receiving taxable income. Yet the striker in Connecticut who gets no unemployment compensation but receives strike relief, would be receiving taxable income even though he receives the relief on the basis of need and in an amount unrelated to his prior earnings.

more of a charitable foundation to social security, paid under legal compulsion without a need standard and in the form of cash, than there is to strike relief provided gratuitously by the union only upon the basis of need and in the form of bare subsistence food and rent payments rather than cash.

Thus, even accepting the Government's fallacious "charity" argument, it is clear that no tangible distinction has yet been suggested which would justify the taxation of strike relief benefits while the related categories of benefits under the social security system are freed from the tax. And the unequal treatment to which the Commissioner would subject strike relief benefits is further highlighted by the fact that this is actually the first instance where the Commissioner has ever sought to impose tax upon subsistence relief.

(ii) If there is anything demonstrated by Congressional and administrative history in this area, it is the fact that subsistence relief has never been deemed a proper source of federal revenue. For instance, the Commissioner has ruled definitively that public assistance payments in the nature of relief to the needy, aged, blind, dependent and disabled persons are not taxable. Rev. Rul. 57-102, C.B. 1957-1, 26. Red Cross aid has likewise been ruled not to constitute taxable income. Special Ruling of IRS, 5 Stan. Fed. Tax. Rep. (1952) Par. 6196. Equally significant is the Commissioner's determination in Rev. Rul. 131, C.B. 1953-2, 112, that an employer's relief or rehabilitation payments to his employees who had suffered losses in a tornado, were not taxable under the Code. The Commissioner emphasized that such payments by an employer were "measured solely by need." Finally, we have been unable to discover any category of relief benefits whatever, with the sole exception of strike relief, upon which the Commissioner has

ever sought to encroach by the assessment of tax thereon.[18]

Under these circumstances the principle of equal or uniform tax treatment is unquestionably controlling. We do not believe that the Government will urge that subsistence relief has in any other area been subjected or sought to be subjected to income tax nor can we conceive of any reason why among all categories of public and private relief benefits, only those to needy strikers should be a source of federal income. The suggestion that Congress meant to derive revenue by levies upon subsistence food and rent to needy strikers and their families is as strained and surprising as the suggestion so definitively laid to rest by the Commissioner himself, that Congress desires to obtain revenue from Red Cross aid, public assistance and similar relief benefits. No more than these related categories of subsistence aid can strike relief be regarded as a legitimate source of revenue for the nation.

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It is submitted that the jury verdict approved by the decision below and the Government's inability to demonstrate why strike relief benefits should be taxed when social security and public and private relief has never been taxed, provide alternative grounds for affirmance without resolution of fundamental "income" and "gift" contentions. If, however, this Court should nevertheless determine to reach the broader issues which the Government would require it to decide, it is clear that the Court of

[18] It should here be noted that the Treasury regulations define as "charitable" "relief of the poor and distressed or of the underprivileged" and "lessening of the burdens of Government". Income Tax Regulations § 1.501(c)(3)—1(d)(2). While we have heretofore demonstrated the untenability of the Government's "charity" differentiation of benefits similar to strike relief, it should be noted that the Regulations themselves seem to recognize no distinction between relief and assistance benefits derived from public and those from private sources.

Appeals correctly ruled that the strike relief received by respondent did not constitute gross income within the meaning of the Code and is, in any event, exempt from taxation as a gift.

II

Strike Relief Receipts Are Not "Income" Under the Code

The court below held that strike relief receipts are not "income" within the meaning of Section 61(a) of the Code. The Government attacks this ruling, urging that this Court's decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, stands for the proposition that any species of receipt or gain, of whatever nature or source, is necessarily "gross income" under the Code unless specifically excepted by the statute (Gov. Br. 39-40). We question whether this Court's generalization in *Glenshaw Glass* that realized gains constitute taxable income can be taken from the context in which the issue was presented to the Court in *Glenshaw Glass* and applied to every other species of realized gains. In any event, the Government's assertion that all realized gain constitutes gross income under the Code begs the critical question whether strike relief constitutes realized gain. *This Court has never held that all receipts constitute realized gain within the statutory language of "gains, profits or income"; indeed it has held precisely to the contrary* (see *infra*, pp. 29-30). As we demonstrate in Section A herein, the legislative history, this Court's decisions, and numerous rulings by the Commissioner himself, all make clear that there are categories of receipts which do not constitute "realized gain" or "income" to the recipient. And in Section B of our discussion, we show that subsistence strike relief benefits fall within the category of alleviative receipts—a category lacking the quality of *enrichment* to the recipient which

appears to be a necessary ingredient of the concept of "gains, profits or income."

A. *The Legislative History, This Court's Decisions, and the Commissioner's Own Rulings Demonstrate that Many Categories of Receipts Do Not Constitute Gross Income.*

As this Court stated in *Glenshaw Glass* (p. 431), in analyzing its earlier characterization of "income" in *Eisner* v. *Macomber*, 252 U.S. 189, 207 (1920): "The definition served a useful purpose" in "that context . . . but it was not meant to provide a touchstone to all future income questions." In our view, this Court's statement in *Glenshaw Glass*—a case involving a punitive damage recovery under the Sherman Act—that Congress intended "to tax all *gains* except those specifically exempted" (p. 430) was not meant to imply that all *receipts*, whatever the nature thereof, necessarily constitute gross income.

(i) The statutory definition in the 1939 Code, Section 22(a), of "gains or profits and income derived from any source whatever" [19] stems from Civil War income tax legislation. Section 90 of the Income Tax Act of July 1, 1862 (12 Stat. 473), imposed a tax on "gains, profits or income" derived from various specified sources or "from any other source whatever". This language, however, was apparently not intended to reach all receipts. The Treasury accordingly held in its early regulations that under the broad language of "gains, profits or income", legacies and testamentary

[19] The successor provision of the 1954 Code, section 61(a), provides that "gross income means all income from whatever source derived". This Court recognized in *Glenshaw Glass* that "no effect" was intended by the change in language (p. 432). But it is worthy of note that the spelling out in the 1954 Code of 15 categories of gains included in gross income would hardly have been necessary under the Government's all-inclusive definition of the words "income from whatever source derived."

gifts, life insurance proceeds, and personal tort damages are not income.[20]

The first income tax act under the Sixteenth Amendment, the Revenue Act of 1913 (Section IIB, 38 Stat. 167), adopted the "gains, profits or income" definition of the Civil War legislation as the base for the imposition of the tax. In the debate prior to enactment, Congressman Cordell Hull, floor manager of the bill, stated (50 Cong. Rec. 506) "It would be impossible here to undertake to explain the application of this provision of the bill to the innumerable transactions arising in this country." For specific application of the general provisions, Congressman Hull directed attention to "the rulings of the Treasury Department and the decisions of the courts of this country with respect to similar provisions of the old income laws, and also the English rules of construction, all essential portions of which will be embraced in the Treasury regulations . . ."

It is clear that in the post-16th Amendment revenue laws Congress intended to carry over and preserve recognized limitations on the concept of income. Cf. *Lynch* v. *Turrish*, 247 U.S. 221, 229-230 (1918). As subsequent decisions of this Court and administrative interpretations by the Commissioner make clear, the statutory definition of income has never lost its flexibility and does not today, any more than in 1913, render every species of receipts "gross income" within the meaning of the Code.

(ii) As early as 1918 this Court stated in *Southern Pacific Co.* v. *Lowe*, 247 U.S. 330, 335:

> "*We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act*

[20] See Wright, *The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts*, 8 Stan. L. Rev. 164, 171.

> *. . . the broad contention submitted in behalf of the government that all receipts—everything that comes in—are income within the proper definition of the term 'gross income'* ''[21] (emphasis supplied).

In a line of decisions this Court has spelled out and upheld the "non-income" character of various types of receipts. Among those it has held not to constitute gross income are alimony receipts,[22] gains arising from unrealized advances in value,[23] life insurance proceeds,[24] and subsidies paid for constructing a railroad and a factory.[25] We do not understand the Government to contend that *Glenshaw Glass* has the effect of overruling all these decisions of this Court. Indeed, the continuing validity of treating categories of receipts as not "income" received this Court's explicit recognition in *Glenshaw Glass* itself; the Court there adverted with approval to "the long history of departmental rulings holding personal injury recoveries nontaxable . . ." (348 U. S. at 432, n. 8). Thus in the very case on which the Government relies, this Court recognized the validity of administrative interpretations holding cate-

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[21] More recently in *Commissioner* v. *Jacobson*, 336 U.S. 28, 38 (1949), this Court reemphasized that:

> "The *first* test of the taxability of such gains relates to their inclusion within the gross income of the taxpayer under Section 22(a) without reference to the specific exclusions made from it by Section 22(b). The *other* test consists of the application to such gains of any of those specific exclusions" (emphasis supplied).

[22] *Gould* v. *Gould*, 245 U.S. 151 (1917).

[23] *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179 (1918). The Solicitor General argued that gross income is equivalent to gross receipts. 247 U.S. at 183-184; see also *Commissioner* v. *Weisman*, 197 F. 2d 221 (1st Cir. 1952); *Lela Sullenger*, 11 T.C. 1076 (1948) acq. C.B. 1952-2, 3.

[24] *United States* v. *Supplee-Biddle Hardware Co.*, 265 U.S. 189 (1924).

[25] *Edwards* v. *Cuba Railroad Co.*, 268 U.S. 628 (1925); Cf. *Brown Shoe Co.* v. *Commissioner*, 339 U.S. 583 (1950); *Detroit Edison Co.* v. *Commissioner*, 319 U.S. 98 (1943). In *Helvering* v. *Ind. Life Ins. Co.*, 292 U.S. 371 (1934), the Court held that the rental value of a building was not income to the owner.

gories of receipts not to constitute income.[26] These and other administrative rulings emphasize the implausibility of the Government's suggested all-encompassing interpretation of "income" — an interpretation which the Commissioner himself refuses to accept.

(iii) In an early ruling after the adoption of the Sixteenth Amendment, the Internal Revenue Service stated: "The Supreme Court has repeatedly held that gross income does not include everything that comes in." Sol. Op. 132, C.B. I-1, 92, 94 (1922). Numerous subsequent administrative rulings by the Commissioner specify categories of receipts which do not constitute gross income. Rulings rendered before *Glenshaw Glass* but unaltered and adhered to by the Commissioner since that decision, as well as rulings rendered after *Glenshaw Glass*, recognize as nontaxable: old age, unemployment and public relief benefits under the social security system,[27] Panama social security payments,[28] Red Cross aid,[29] personal injury damages,[30] damages for breach of promise and alienation of affections,[31] an award for wrongful death,[32] payments to

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[26] Subsequently, this Court expressly recognized in *Commissioner* v. *Lo Bue*, 351 U.S. 243, 248, that "gain" derived from a purchase at a bargain price below value does not constitute taxable income.

[27] See p. 8, *supra*.

[28] See p. 8, *supra*.

[29] Special Ruling of I.R.S., 5 Stan. Fed. Tax. Rep (1952) Par. 6196.

[30] C. A. Hawkins, 6 B.T.A. 1023 (1927); Sol. Op. 132, I-1, C.B. 92.

[31] G.C.M. 4333, C.B. VII-2, 185 (1928); I.T. 2422, C.B. VII-2, 186 (1928); Sol. Op. 132, C.B. I-1, 92 (1922). In fact the Commissioner originally held that damages for breach of promise to marry and alienation of affections were income. Damages for breach of contract were income because the benefits of which the injured party was deprived were merely anticipatory rather than "a return of capital" O.D. 501, C.B. 2, 70 (1920). Damages for alienation of affections were income because "from no ordinary conception of the term can a wife's affections be regarded as constituting capital." S. 1384, C.B. 2, 71, 72 (1920). The Commissioner reversed himself in G.C.M. 4363 and Sol. Op. 132 on the theory that these recoveries are not income.

[32] I.T. 2420, C.B. VII-2, 123 (1928); Rev. Rul. 54-19, C.B. 1954-1, 179.

war prisoners for mistreatment by the enemy,[33] rehabilitation payments by an employer to his employees,[34] Nazi persecution indemnities,[35] meals and lodging and reimbursement of moving expenses provided to employees for the convenience of the employer,[36] premiums paid by an employer on employee group life insurance,[37] and farmer consumption of his own produce.[38] Such rulings by the Commissioner himself speak eloquently against the proposition advanced by the Government here, that all receipts necessarily constitute gross income under the Code.

The foregoing demonstration that there are significant areas of non-income receipts is, we submit, dispositive of the instant case. In disputing the holding of the court below that strike relief is not income, the Government has chosen to rely *exclusively* upon its interpretation of *Glenshaw Glass* that all receipts are income and that strike relief must therefore be income.[39] The Government's sole

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[33] Rev. Rul. 55-132, C.B. 1955-1, 213.

[34] Rev. Rul. 131, C.B. 1953-2, 112. It should be noted that the ruling specifically recognizes that the benefits involved were not income under "Section 22(a) of the Code."

[35] Rev. Rul. 56-518, C.B. 1956-2, 25.

[36] If the meals and lodgings are not for the convenience of the employer they constitute additional compensation and are, of course, taxable. *Diamond* v. *Starr*, 221 F. 2d 264 (2d Cir. 1955); *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954); *Jones* v. *United States*, 60 Ct. Cl. 552 (1925); Reg. 111, Section 29.22(a)(3); Reg. 118, Section 39.22(a)(3). Section 119 of the 1954 Code now grants an exclusion subject to specified conditions. See *Boykin* v. *Commissioner*, 260 F. 2d 249 (8th Cir. 1958). The moving expense ruling is Rev. Rul. 54-429, C.B. 1954-2, 53.

[37] T.D. 6272, Section 1.61-2(d)(2), C.B. 1957-2, 18, 21; I.O. 1014, C.B. 2, 88 (1920); Rev. Rul. 56-400, C.B. 1956-2, 116; Rev. Rul. 55-357, 1955-1, 13.

[38] See Rev. Rul. 56-496, C.B. 1956-2, 17; Farmers Tax Guide, IRS Pub. No. 225 (1960 ed.) p. 27; *Homer P. Morris*, 9 B.T.A. 1273 (1928).

[39] The Government's four-sentence afterthought (at p. 42) that strike relief might be income to respondent under *Eisner* v. *Macomber* as "'compensation' for his striking" rests on the Government's faulty assumption "that respondent performed acts requested by the union"—that strike

attack on the ruling below having failed, respondent would not appear obligated to go further and demonstrate the correctness of that ruling. We are, however, prepared to demonstrate the eminent correctness of the holding below that strike relief does not constitute income subject to the tax.

B. *Subsistence Relief to Needy Strikers Is in the Area of Merely Alleviative Receipts, Which Have Never Been Deemed to Constitute Income Under the Code*

The various categories of receipts which the Commissioner has deemed, both before and after *Glenshaw Glass*, not to be subject to income tax do not represent arbitrary exceptions to the concept of income. Rather, we believe, there is a common denominator running through the recognized categories of non-income receipts, applicable to strike relief as well.

The types of receipts most analogous to strike relief—social security retirement, unemployment compensation, public relief, Red Cross aid, reparation payments, personal damage recoveries, and the like—have all been regarded by the Commissioner as receipts which do not constitute income. Why have these analogous areas of receipts not been regarded as income subject to the tax? The answer, we believe, must rest upon the ultimate fact that Congress has never given content or definition to the terms "gains, profits or income", but has rather relied upon and adopted the ordinary understanding of these terms as they are used in common parlance.

What is the subtle but vital distinction between "re-

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relief is "compensation" for striking, i.e., for refraining from work. This contention, one the Government rests on the closeness of the relation between striking and benefits, of which the Government makes much in its analysis of the "gift" issue, is answered *infra* at pp. 38 to 41.

ceipts", and "gains, profits, or income"? We submit that the element of distinction is best characterized as that of "*enrichment*".[40] Receipts which are merely *alleviative*, serving as reparation for loss, hardship, injury or distress suffered by the recipient, simply do not fall within the ordinary concept of "gains, profit, or income," all of which import an element of net accretion or real enrichment. Here too is the distinction between *Glenshaw Glass* and the numerous administrative exclusions of receipts from income to which the Commissioner has continued to adhere. The punitive damage recovery in *Glenshaw Glass* was unquestionably a real profit to the recipient (indeed, a windfall profit) which, just like the profit derived from labor or capital, is properly deemed to be "gain" or "income". By contrast, most of those categories of receipts treated by the Commissioner as not income lack any element of enrichment or real profit, and constitute mere alleviation of loss, hardship, distress, or injury actually suffered. The alleviation factor present in the rulings on social security retirement, unemployment compensation, public relief, Red Cross aid, and personal injury damage recoveries is obvious and requires no elaboration. In the same vein, employer rehabilitation payments to employees represent alleviation of actual hardship suffered; payments to war prisoners for enemy mistreatment are monetary recompense for personal injury and suffering, as is compensation paid by Germany to former citizens for "damage to life, body, health, liberty, rights of property ownership, or to professional or economic advancement" which was ruled after

[40] The very first definition of income by the floor manager of the 1861 Act, as the "net *profits* of a man for the year . . ." (Congressional Globe, 37th Cong., 1st Sess., 315) reveals the essence of the concept of income not as the receipt of *money* but as the receipt of *profit*. This Court itself has construed the word "income" as it is known "in the common speech of men." *United States* v. *Safety Car Heating Co.*, 297 U.S. 88, 99 (1936).

Glenshaw Glass not to be income to the recipient. Rev. Rul. 56-518, C.B. 1956-2, 25.[41]

Nor has this common denominator of alleviation, as distinguished from enrichment, been absent from this Court's decisions. Thus, in *Gould* v. *Gould*, 245 U.S. 151, the "non-income" alimony was directed to relieving a divorced wife from the loss of her husband's support. In *United States* v. *Supplee-Biddle Hardware Co.*, 265 U.S. 189, 195, the life insurance receipts held not to be income to the employer were but a recompense for the loss of a valued employee—as this Court pointed out, "*a substitution of money value for something permanently lost . . .*" Similarly, in *Bowers* v. *Kerbaugh-Empire Co.*, 271 U.S. 170, a diminution in value of foreign currency resulting in a "gain" upon repayment of a loan was held not to be income because the overall use of the money resulted in a net loss.[42]

If we are correct that receipts which do not constitute enrichment to the recipient, but merely alleviation of his hardship, need, or loss actually suffered, are not "income", certainly strike relief falls within the suggested common denominator. As has been demonstrated, all that strike relief represents is alleviation of the hardship and impoverishment to which needy workers and their fam-

[41] In *Glenshaw Glass*, 348 U.S. at 131, n. 8, this Court referred to the rulings which held personal injury recoveries as nontaxable because they "roughly correspond to a return of capital" and were compensatory in nature. Personal injury recoveries nonetheless unquestionably constitute monetary receipts to the taxpayer. Moreover, it is very difficult to find a return of capital in many of the administrative rulings which fall within this area, such as damages for breach of promise to marry, money received by a parent for the surrender of custody of his minor child, an award under a wrongful death statute, payments to prisoners of war for mistreatment by captors or the compensation paid by Germany for damages for physical injury and professional or economic advancement suffered because of the Nazi persecution.

[42] See also *Rice, Burton & Foley* v. *Commissioner*, 41 F. 2d 339 (1st Cir. 1930).

ilies are subjected. By no stretch of the imagination could the receipt of such relief for the bare sustenance of strikers and their families be deemed to constitute a windfall profit or enrichment, or indeed, any realized "profit" or "gain" whatever. Under these circumstances it appears clear that, like other categories of alleviative receipts representing no realized net profit to the recipient—retirement, unemployment compensation, relief, Red Cross aid, reparation payments and the like—strike relief received by needy workers is not income subject to the tax.

In the absence of any attempt by the Commissioner to reconcile his own rulings with the theory he offers this Court, we would hope that the common denominator here offered would receive the hospitable consideration of the Court.[43] In any event, it is clear that no distinction can be sustained between strike relief and the numerous similar benefits consistently held not to be taxable income to the recipient, and that the Government has offered no tenable distinction nor sought to make any argument on the "income" issue except its reference to *Glenshaw Glass*. Under these circumstances we submit that the ruling of the court below that strike relief benefits are not income under the Code should be affirmed.[44]

[43] There may of course be cases that do not fit within the suggested common denominator of enrichment as opposed to alleviation. But even if this common denominator may not run through all the cases on "income", it does appear to reconcile the greatest number of them.

[44] The Government makes a half-hearted attempt to apply the re-enactment doctrine, suggesting that the administrative treatment of strike relief "is at the very least entitled to great weight" and relying upon O.D. 552, 2 Cum. Bull. 73 (1920). (Gov. Br. p. 46). But O.D. 552 held that "Benefits received from a labor union by an individual *member* while on strike are to be included in his gross income" (emphasis supplied). Obviously, there is nothing in O.D. 552 which required strike relief paid by a union to *nonmembers* to be included in gross income.

In any case, the mere lapse of time since O.D. 552 was promulgated does not justify the application of the re-enactment doctrine. As this Court said in *Glenshaw Glass*, "Re-enactment particularly without the

If, however, that ruling should be deemed to be erroneous, it remains a fact, as the jury and the court below held, that strike relief constitutes a tax exempt gift to needy strikers and their families.

III

Strike Relief Constitutes a Gift to the Needy

The Government attacks the ruling below that strike benefits received by respondent constituted a "gift" exempt from tax. The Government argues, in the face of the jury finding to the contrary, that strike relief does not constitute a gift because it is payment "for" striking or in return "for" the obligation to pay dues. However as we demonstrate in Section A of the argument, the court below and the jury were eminently correct in finding that strike relief is given gratuitously without any return obligation or consideration flowing from the recipients to the

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slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best." 348 U.S. 426, 431. As the court below said, "the Government has made no showing that the 1920 rule was even considered by Congress" (R. 62).

The Treasury Department itself apparently paid no attention to the obscure 1920 O.D. It was not until the 1957 edition of "Your Federal Income Tax" (the official publication of the Internal Revenue Service which is published annually for the guidance of taxpayers) that the Internal Revenue Service stated therein that strike benefits were includible in income. These booklets are represented to contain "explanations of the aspects of the Federal Income Tax laws that are most often encountered by taxpayers." "Your Federal Income Tax" (1953 edition), Foreword by Commissioner Andrews. We submit that O.D. 552 was hardly known and never enforced until 1957 and is totally without significance here.

This Court has recognized that the re-enactment doctrine is inapplicable in the absence of Congressional familiarity with the regulation involved, and that re-enactment unaccompanied by "Congressional discussion which throws light on its intended scope" is without significance. *United States* v. *Calamaro*, 354 U.S. 351 at 359; *Helvering* v. *N. Y. Trust Co.*, 292 U.S. 455, 468. If this is true with respect to regulations, how much more does it apply to an obscure and disregarded ruling.

union. The Government's second and alternative contention is that even a benefit gratuitously bestowed must be denied gift status if economic self-interest motivated the donor in bestowing the benefit. But, as we demonstrate in Section B, neither precedent nor sound tax administration warrants denial of the donee's right to claim the gift exemption for benefits received gratuitously, merely because there may be an admixture of self-interest motivating the donor in his bestowal of the gratuity.

A. *The Recipient of Strike Relief Renders No Service or Obligation for the Receipt of His Subsistence Benefits.*

In urging that strike relief to those in need is not distributed by the International Union gratuitously, the Government asserts that such relief is in the nature of payment "for" striking (Gov. Br. 24-25, 31-33) or, in the alternative, that it is payment in the nature of a return "for" union dues (Gov. Br. 16-18, 33-34). The jury however was eminently correct in its finding that the strike relief was given respondent simply gratuitously.

(1) Strike relief benefits are not distributed as compensation for striking

Subsistence relief to needy strikers is not compensation for striking—the relief is not given to all who are on strike but only to those who are in need. Actually, the Government explicitly recognizes that "*an employee need not promise to continue on strike or undertake to perform active duties, such as picketing, to receive the payments*" (Gov. Br. p. 24). Of course, the relief was limited to needy workers on strike; how could it be otherwise? The benefits were strike relief. But the fact that a gift is limited to a particular class does not thereby render it a payment "*for*" having entered or "*for*" remaining in the class.

Indeed, the Government does not contend that the restriction of benefits to needy "strikers" in itself requires their characterization as being "for" striking (Gov. Br. 25, n. 13). The Government does, however, contend that the act of striking in response to an International Union "request" creates a causal relationship requiring the legal conclusion that the benefits are compensation for striking. The Government, however, is wrong on both counts.

The strike was not called at the request of the International Union which provided the bulk of the strike relief; the strike was called by Kohler workers by secret ballot, and the International's role, far from requesting the strike, was one of restraint. It was not the International but the employees themselves who called the strike for their own benefit (see *supra*, p. 3). The Government's conclusion that strike relief is compensation for an act requested by the donor union, necessarily collapses with its faulty premise that the International Union requested the strike.

Moreover, strike relief, paid only to those in need, is not compensation for striking. Compensation carries with it the connotation of actual causal relationship between some service or promise and its remuneration. The record is clear that the relief which was given was based solely on need. Thus, a striker would receive no benefits if his wife and children went to work (R. 62), or if he received unemployment compensation (R. 32), or public assistance (R. 37), or if the striking employee found temporary work with another employer (R. 32, 61-62). The factor determining the amount of relief was the personal need, the marital status and number of dependents of the recipient (R. 23, 29, 62), not a monetary value put upon some alleged benefit to the union of the striker refraining from work. Any "value" to the union is as great in the case of a single man with substantial savings who needs no help, as it is in the case of the

man with six children and a sick wife who needs the maximum assistance possible. The strike relief could not, therefore, have been given to the taxpayer to induce him to refrain from working. If that had been the purpose, strike relief would have been made available to all rather than just those in need. Such grants to persons in need are consistent only with gift; as one court stated it: "Need is a major consideration in deciding the amount of a philanthropic award." *Peters* v. *Smith*, 221 F. 2d 721, 724 (3d Cir. 1955); See also *Fifth Avenue Coach Lines*, 31 T. C. 1080, 1096 (1959).

Additional demonstration of the non-compensatory nature of subsistence relief to needy strikers arises from the fact that such relief is discontinued if the employee finds other employment, temporary or permanent. Were strike relief an incentive payment to induce employees to continue to withhold their work from the struck employer, certainly the incentive would be continued for workers who have found temporary but ordinarily less remunerative employment elsewhere. Moreover, the amount of strike relief dispensed to individual workers is clearly so minimal that it cannot seriously be viewed as alternative compensation to the employee for withholding his labor. It is difficult to understand how employees earning $100 or more per week could be induced to go or remain on strike by the remote and unappealing prospect that they may receive from the union some subsistence dole. And finally, the benevolent and non-compensatory nature of the union's relief distribution is reinforced by the fact of distribution of benefits irrespective of the recipients' nonmembership in the union.

The Government's contention that strike benefits are in the nature of compensation for striking may be tested by a recent extension of the Commissioner's position. In Rev. Rul. 58-139, C.B. 1958-1, 14, the Commissioner held that "lockout" benefits paid by a union on the basis of need to

employees locked out by their employer in the course of a labor dispute are includible in gross income. Obviously, the rationale that the strike benefits are taxable because they are compensation "for" striking is utterly inapplicable where the employer locks the employees out; for the union gains nothing from continuation of the "lockout" and its payments would not in the least influence the duration thereof. The Commissioner, however, analogized the lockout ruling to his strike-benefit ruling on the theory that benefits paid on account of a lockout "like strike benefits, are distributed in furtherance of union objectives." This *ad absurdum* extension of the Government's "furtherance of union objectives" argument demonstrates the strained nature of its effort to find "compensation" where the operative intention is to relieve hardship, and demonstrates again that strike relief is not compensation for striking but rather subsistence relief to the needy.[45]

(2) Strike relief is not conferred as a *quid pro quo* for the payment of union dues

In an alternative attempt to demonstrate "consideration," the Government postulates a theory that there is a

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[45] The Government, it should be noted, is candid enough to concede that *"employees are induced to strike and continue striking primarily by their own self-interest and their loyalty to the union cause, and not by the prospect of receiving strike benefits"* (Br. 19). It goes on, however, to explain that by alleviating hardship, strike benefits make it "possible (or at least easier) for the employees to continue striking . . ." (Br. 20). Nowhere else does the Government reveal as clearly as here the encompassing reach of its argument—that an International Union *cannot* bestow a gift upon needy strikers. While doubtless the Government would be happy to have this Court so proclaim, we submit that so irrational a presumption of law, one which completely overrides the actual charitable intention in this and other cases, would leave little remaining room for the operation of the gift exemption. In the greatest majority of gratuitous transactions, there is some past service or favor by the donee which the Government would deem the "consideration" which the subsequent gratuity is "compensating." The Government's all-encompassing "presumption" to serve its tax purposes underlines the virtues of the jury trial safeguard which stands in the way of its contentions.

"contract" for the payment of strike relief in exchange for dues, citing the provision of the International Union Constitution that "it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union". On the basis of this general declaration of union policy, the Government asserts that strike relief is granted under a "contractual obligation" of the members of the International Union to each other (and in a tortuous analogy to third party beneficiary concepts, to nonmembers who also receive strike relief) and it asserts that the consideration or *quid pro quo* for this "obligation" is the payment of dues to the union (Gov. Br. 16-18, 33-34).[46]

(i) The contention that the union's Constitution is a contract among the 1,200,000 members of the International Union is clearly untenable. While courts have, on occasion, resorted to contract principles in resolving intra-union problems, particularly those concerning liquidation of assets on dissolution and the right to membership, the untenability of the contract theory as applied to a union Constitution *in toto* was ably demonstrated in Professor Chaffee's noted analysis, "The Internal Affairs of Associations Not For Profit," 43 Harv. L. Rev. 993, 1001-1008. As Professor Chaffee pointed out, it is perfectly clear that union constitutions are not intended to be contractual:

> "The fact is that a new member does not think of himself as forming any . . . vast network of executory

[46] The very term third-party "beneficiary" emphasizes the Government's inability to demonstrate that the third party beneficiary, respondent herein, provided any dues "consideration" to the donor for his strike relief. The government does not and cannot explain, of course, how respondent who was not a member and never paid dues prior to or during the receipt of strike relief or at any time during the taxable year, furnished any *quid pro quo* therefor.

transactions with the other members, but as entering into a present relation with the association. True, it is a consensual relation, but it is not usually regarded by him as mainly promissory. It is about the same sort of contract as the *Contrat Social* of Rousseau or the Charter of Dartmouth College." [47]

In any event, as the Government is itself forced to concede, nothing in the discretionary strike relief provision contained in the union's Constitution creates an enforceable right to the receipt of strike relief by anyone (Gov. Br. 17, n. 7, 34, n. 19).[48] Even if the Constitution be deemed to incorporate certain general "contractual" rights, such as the right to membership, or to assets on liquidation (see *International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617, 618; *Harker* v. *McKissock*, 7 N.J. 323, 81 A. 2d 480 (1951)), the bulk of the 100-page UAW Constitution is in the nature of declaration of policy rather than of contractual obligation. Certainly the general provision concerning strike assistance falls into the policy category. It thus appears clear that the strike relief policy which the Government describes as a contractual obligation between 1,200,000 members of the UAW (and an open-ended class of non-

[47] See Summers, "Judicial Settlement of Internal Union Disputes," 7 Buffalo L. Rev. 405, 411, et seq. "The Constitution seeks to define a whole network of complex relationships in a document drawn to guide officers and members in their daily dealings rather than lawyers and judges in litigation" (*id.* at 416). As stated in *Grand International Brotherhood* v. *Couch*, 184 So. 173, 236 Ala. 611, to support an action predicated on a provision of a union's constitution it "must possess the essentials of a duty to do a specific act." Finding no such duty, the Court in *Brotherhood of Railroad Trainmen* v. *Barnhill*, 214 Ala. 565, 108 So. 456, ruled against a member who sued his union to obtain strike relief.

[48] In *Match* v. *Commissioner*, 209 F. 2d 390, 392 (3d Cir. 1954), the Court emphasized in finding a gift that the possibility that payment "could be stopped or changed at any time" was significant in determining that the payments were gifts.

members as well), is neither "contractual" nor an "obligation."[49]

(ii) The Government concedes that even a payment on a contractual obligation will not defeat gift if the obligation itself arises from a gift. It therefore seeks to demonstrate "consideration" flowing from recipients of strike relief—their union dues—which is said to be the "*quid pro quo*" for the receipt of strike relief (Gov. Br. 33). But strike relief is not granted by the union in any sense in exchange for the members' obligation to pay dues and, conversely, dues are not paid by members in exchange for any obligation by the union to grant strike relief benefits to them.

The value of strike benefits received, if any, bears no relationship whatever to the amount of dues paid. Some union members pay dues all their lives without ever receiving strike benefits either because they participate in no strike or because they are not in need. Some strikers, like Kaiser, receive strike benefits without ever having paid any dues at all. In a *quid pro quo* arrangement the *quantum* of the benefit received would normally bear at least *some* relationship to the *quantum* of the consideration given

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[49] It should be noted that the Government's contract theory is not only utterly inapplicable to the respondent before this Court, but is also irrelevant with respect to strike relief donated by many national unions whose constitutions are entirely silent on the subject but which grant strike relief in the same discretionary manner as does the UAW. For example, no reference to strike relief appears in the Constitutions of the United Steel Workers, the Amalgamated Clothing Workers, the Textile Workers and the United Electrical Workers. The inapplicability of the Government's contract argument to strike relief conferred by these unions once again underlines the inappropriateness of the Government's request that this Court fashion a binding rule for future strike relief cases to the effect that they do not constitute gifts. Certainly, if, at the Government's urging, this Court should conceivably rule strike relief not to be a gift because of an alleged "contractual obligation" in the union's Constitution, it would be highly improper for the Commissioner thereafter to promulgate a general rule, applicable as well to strike relief conferred by unions whose constitutions, being silent on the subject, do not create any "contractual obligation" with respect to strike relief.

therefor. Here there is no such relationship. In a *quid pro quo* arrangement the measure of the benefits conferred would bear a relationship to the consideration therefor rather than the need of the person upon whom the benefit is conferred. Moreover, in a *quid pro quo* arrangement, the donor of the benefits would be the recipient of the consideration therefor. But strike benefits are not necessarily provided by the local union or even by the International with which it is affiliated. In the present case the cost was largely borne by the International Union, which derives its funds from many sources. The International and the locals are as distinct entities as the several states and the United States. In many instances, the sources of the strike relief include local or international unions in completely different industries, local businessmen and even members of the public. Local businessmen or members of the public cannot conceivably make strike relief funds available in response to the fact that some of the strikers paid union dues. Completely unrelated labor organizations do not provide strike relief funds because the strikers, or some of them, have paid dues to another labor organization. Certainly strike relief derived from donations by such outside entities are granted to the union and from the union to the strikers as pure gifts, as the Commissioner himself has ruled. See *infra*, Appendix A, p. 60; see also Gov. Br. 25, n. 13.

Conversely, the distribution by the union of strike relief to needy strikers and their families, both union members and nonmembers, is certainly not in consideration of or in exchange for any union dues flowing from the members to the union. Strike relief to needy strikers can hardly be denominated a return of union dues to members since the relief is distributed only to those who are in need rather than to those who have paid dues, and indeed it is equally

distributed to those in need who have never chosen to pay dues at all.

As the Government concedes, "the fact that a payment is made pursuant to an obligation does not preclude its being a gift if the obligation itself was created by a gift" (Gov. Br. 33). To whatever extent distribution of strike benefits constitutes an "obligation" of the union, it is one which it has undertaken gratuitously. Whether or not the UAW Constitution be a contract between the members in some aspects, certainly strike relief and dues are not consideration or "*quid pro quo*" for each other. That members of unions pay dues to the union does not in and of itself render it impossible for the union to distribute what are in fact and in law gratuitous benefits to members and nonmembers. Yet it is only on the proposition that everything received from a union by members and nonmembers is necessarily a return of union dues, a proposition so broad that the Government does not and cannot go so far, that the *quid pro quo* argument can succeed.

In sum, neither the act of striking nor the payment of union dues can properly be deemed to be a condition of, consideration for, or the motivating factor in, the union's distribution of food and rent assistance to needy strikers and their families. Under these circumstances, strike relief, as the jury found, is received gratuitously and constitutes a gift for purposes of the exemption from income tax.

B. *Donor's Expectation of Return Economic Advantage, Even If It Existed, Would Not Defeat the Gift Status of Strike Relief Gratuitously Received.*

The foregoing demonstration that strike relief is received gratuitously, without return benefit or obligation, is, we submit, dispositive on the issue of gift. Contrary to the Government's suggestion that gratuities may be de-

nied the exemption for gifts merely because of the donor's hope or expectation of some return economic benefit, this Court's decisions make clear that *gratuity and gratuity alone* constitutes the test of gift under the Code.

(i) One of the earliest pronouncements of this Court on the issue was that in *Bogardus* v. *Commissioner*, 302 U.S. 34 (1937), where this Court found that gratuitously bestowed honorariums to former employees of a predecessor corporation constituted tax exempt gifts. The Court emphasized (at p. 43) that there was no implicit or covert understanding at the time of the former employment relationship that there would be any additional compensation therefor, stating: "the intention was to make gifts in recognition of, not payments for, former services." Since from the point of view of the recipients the honorariums were received gratuitously and without obligation, the donor's intention to reward past services was ruled not to transform the gift to compensation.

The Government now appears to take the view that mutual gratuities between parties can be made to lose their gift status by regarding the first of the gratuities as the "past consideration" for the second. See e.g., the Government's Brief in *Commissioner* v. *Duberstein*, No. 376, this Term. The cases, however, do not support the Government's contention. The courts have properly followed the view adopted in the *Bogardus* decision that a donor may actually be rewarding service or benefit previously rendered by the donee, even one rendered under contract, yet its subsequent gratuitous reward constitutes not compensation but a gift.[50]

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[50] See e.g., cases where a congregation has made an additional award to a departing or retiring minister: *Mutch* v. *Commissioner*, 209 F. 2d 390 (3d Cir. 1954); *Schall* v. *Commissioner*, 174 F. 2d 893 (5th Cir. 1949); *Abernethy* v. *Commissioner*, 211 F. 2d 651 (D.C. Cir. 1954); *Hershman* v. *Kavanagh*, 120 F. Supp. 956 (E.D. Mich. 1953), affirmed 210 F. 2d 654 (6th Cir. 1954). The Government criticizes these cases, Gov. Br. 27,

The next important review by this Court was in *Helvering* v. *American Dental Co.*, 318 U.S. 322 (1943). The Court there held the gratuitous cancellation of a debtor's indebtedness by his creditors to constitute a gift exempt from income tax. The Court was explicit on the proposition that gratuity constitutes the test of "gift", stating (at p. 30) that the term

> "is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously."

Indeed, in *American Dental* (318 U.S. at 331) this Court expressly rejected the Government's present contention that gratuitously received benefits may be denied gift status merely because of the business motives of the donor:

> "The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and suf-

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n. 14, although the Commissioner has agreed to follow them. Rev. Rul. 55-422, C.B. 1955-1, 14.

In *Peters* v. *Smith*, 221 F. 2d 721 (3d Cir. 1955), the grant of a pension to a retired employee of a large department store was held to be a gift. In *Adams* v. *Riordan*, 57-2 U.S.T.C. ¶9770 (D.C. Vt. 1957) the court found a gift in the grant of a monthly pension for life as an honorarium by the Society for the Preservation and Encouragement of Barber Shop Quartet Singing in America to its secretary upon his retirement in recognition of his many years of legal service. In *J. Marion Wright*, 30 T.C. 392 (1958), in which the Commissioner acquiesced (C.B. 1958-2, 8) a payment of $10,000 to an attorney by a committee organized under the auspices of the Japanese Chamber of Commerce in appreciation of his services in having the California alien land acts declared unconstitutional was likewise held to be a gift. In *Cox* v. *Kraemer*, 88 F. Supp. 835 (D.C. Conn. 1948), reimbursement by a state for expenditures incurred by a state official in defending the propriety of his actions in the course of his employment was held to be a gift.

ficient to make the cancellation here gifts within the statute." [51]

In *Robertson* v. *United States*, 343 U.S. 711 (1952), this Court more recently indicated its adherence to gratuity as the measure of gift. The *Robertson* case held that a prize award for a symphony submitted in a music contest under an agreement by the composer giving up valuable rights in his work, constituted remuneration rather than gift. This Court specifically found the "prize" to be the "discharge of legal obligations—the payment for services rendered or consideration paid . . . in no sense a gift." 343 U.S. at 713.[52]

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[51] The Government submits that the *American Dental* decision was severely limited or overruled by *Commissioner* v. *Jacobson*, 336 U.S. 28 (Br. 29). But this Court in *Jacobson* actually *applied* the "something for nothing" test laid down in *American Dental:*

> "The situation in each transaction is a factual one. It turns upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and of the balance 'for nothing.' The latter situation is more likely to arise in connection with a release of an open account for rent or for interest as was found to have occurred in *Helvering* v. *American Dental Co., supra*, than in the sale of outstanding securities . . . as presented in this case." 336 U.S. at 51.

The Eighth Circuit has followed *American Dental* on analogous facts after the *Jacobson* decision in *Reynolds* v. *Boos*, 188 F. 2d 322 (8th Cir. 1951). Recognizing the continuing vitality of *American Dental*, the District Court in that case observed: "Nothing said by the Supreme Court in *Commissioner of Internal Revenue* v. *Jacobson*, 1949, 336 U.S. 28, 69 S. Ct. 358, wherein the question of gifts was again before the court, may be taken to indicate disapproval of the decision in the *American Dental Co.* case." 84 F. Supp. 185, 189 (D.C. Minn. 1949).

[52] The Government quotes a statement from the *Robertson* opinion for its argument that charitable impulse is a necessary ingredient of gift under the Code (Gov. Br. p. 28): "The case would be different if an award were made in recognition of past achievements or present abilities, or if payments were given not for services . . . but out of affection, respect, admiration, charity or like impulses." 343 U.S. at 713-714. But this language, by juxtaposing services on the one hand with donor motivation on the other, merely makes clear the Court's intention to reaffirm the *American Dental* gratuity test of gift as "something for nothing."

Finally, in *Commissioner* v. *Lo Bue*, 351 U.S. 243 (1956), in finding that stock options offered to employees did not constitute gifts under the statute, the Court once more made clear that the finding of gift hinges on determination of the objective question whether the benefit conferred is actually a gratuity or merely an alternative form of compensation for services, rather than upon any subjective test of donor motive. The Court emphasized that "the company was not giving something away for nothing" and that when "assets are transferred by an employer to an employee to secure better services they are plainly compensation" (351 U.S. at 247).

Decisions of lower courts likewise illustrate the principle that donor economic interest, even an interest permitting the business expenditure deduction, will not defeat the gift status of benefits gratuitously received. Thus in *Glenn* v. *Bates*, 217 F. 2d 535, the Sixth Circuit held that when a dealer advertised that a new automobile would be given away to one who came to his showroom on a given date, the automobile thus given away was, to the recipient, a gift. Although the donor's motivation was obviously and purely one of business interest, the Court upheld the taxpayer's claim of the gift exemption since to the recipient the car constituted a gratuity. Other advertising give-away rulings are to like effect.[53]

The Commissioner himself has recognized that a benefit

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[53] See e.g., *Ray W. Campeau*, 24 T.C. 370 (1955); *Pauline C. Washburn*, 5 T.C. 1333 (1945); *Fernandez* v. *Fahs*, 144 F. Supp. 630 (S.D. Fla. 1956); *Lawton* v. *United States*, 143 F. Supp. 640 (D.C. Va. 1956). In like vein in a number of cases the courts have held that payments made by employers to the widows of former employees are received as gifts by the widows. Neither "past considerations" nor the business deductibility of such payments by the employer have been found sufficient to defeat the gift status of the benefits for which the widows rendered no service or obligation. See appendix in the *Brief Amicus Curiae on Behalf of Mrs. Bernice Curry Myers* in this case.

conferred by a donor from economic self-interest may still be received by the donee as a gift. For instance, the Commissioner ruled only last year that employer distributions of turkeys, hams and similar items to employees at Christmas time constituted gifts to the employees although their cost was deductible as business expense by the employer. Rev. Rul. 59-58, C.B. 1959-1, 17. Similarly, the Commissioner has agreed to follow numerous court decisions that payments to widows of deceased employees are gifts though deductible by the corporation as business expenditures. Rev. Rul. 58-613, C.B. 1958-2, 914. Economic motive is often strongly present in a gift of property from father to son—to reduce income and estate taxes—but the transaction is still a gift. Corporations support local community chests, the Red Cross and the like to promote their public relations programs and yet these business expenditures are deductible as charitable gifts.

Examples could be multiplied but there is no need, for it is eminently clear that the decisions of this Court, the numerous holdings of lower courts, and the rulings of the Commissioner himself demonstrate that gratuity rather than donor motivation constitutes the test of gift under the Code.

"(ii) It should be noted that the Government's "donor motivation" test of gift not only fails to find support in previous decisions but would also create unwarranted burdens in the enforcement of the gift exemption. The Government has made much of the need for a "uniform rule" concerning the tax status of strike relief benefits. Yet the Government's substitution of the subjective "donor motivation" test of gift for the current objective "gratuity" test would make for precisely the kind of case-by-case, jury-by-jury, problems the Government professes a desire to avoid. If, as the Government would have it, donor motiva-

tion provides the test of gift, how could the Commissioner properly render a general ruling on strike benefits which, under the Government's view, are allowed or denied the gift exemption in the light of the particular donor's particular motivation? The Government's proffered test of gift would, if accepted, create piecemeal litigation burdens in the determination of subjective donor motivation.[54]

To reject the donor motivation test is not, of course, to deny the Government fair opportunity to collect tax on payments which are in fact compensation, whether or not denominated by the donor as a gift. Within employer-employee and similar commercial relationships the ordinary inference is that benefits conferred are part of the *quid pro quo* of the relationship. Some courts have gone so far as to say that in employment situations there is a presumption that bonuses, honorariums and similarly denominated "gifts" are in fact part of the ordinary compensation contemplated by the relationship of the parties.[55] Thus to adhere to the present rule that a gratuity constitutes a gift is not to deny the Government fair opportunity to tax commercial transactions which, however denominated, are in fact compensation. The burden remains upon the taxpayer to demonstrate "gift", and the closer and more continuous the commercial relationship between donor and

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[54] We cannot refrain from noting the inherent illogic of the Government's attempt to resolve the taxpayer's right to claim the gift exemption not upon the basis of the status of the recipient taxpayer but rather upon the basis of the motives of a third party—the donor. Nothing in the legislative history of the gift exemption implies that Congress meant to impose upon the taxpayer claiming the benefit of the exemption so difficult and elusive a burden of proof as the Government's donor motivation test would create.

[55] See e.g., *Neville* v. *Brodrick*, 235 F. 2d 263 (10th Cir. 1956); *Wallace* v. *Commissioner*, 219 F. 2d 855 (5th Cir. 1955); *Carragan* v. *Commissioner*, 197 F. 2d 246 (2d Cir. 1952); *Wilkie* v. *Commissioner*, 127 F. 2d 953 (6th Cir. 1942), *cert. denied*, 317 U.S. 659.

donee, the more onerous is the taxpayer's burden of proof.

In its brief in *Commissioner* v. *Duberstein*, No. 376, the Government makes much of that taxpayer burden, suggesting in effect that in the commercial relationship involved in that case what was denominated as gift was but a covert form of compensation. No doubt a similar contention will be made in *Stanton* v. *Commissioner*, No. 546. In our view the record in both *Duberstein* and *Stanton* fails to bear out the Government's attack upon the gift status of the transactions there involved.[36] In any event, this Court need not adopt erroneous principle to achieve correct result, and it is clear that even in the commercial and employment cases the objective gratuity test of gift provides the Government with fair opportunity to impose tax upon what is in fact not gift but compensation.

The Government's unhappiness with the objective gratuity test of gift is, of course, an unhappiness created by this Court's decision in *Bogardus*, followed in *American Dental* and subsequent cases. But in the more than twenty years since *Bogardus* was decided, there has been no indication of Congressional concern that this Court's gratuity test of

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[36] The Government is concerned about the *Duberstein* and *Stanton* cases because their primary importance "lies in the tax treatment of payments made by business entities, and particularly . . . by corporations." The Government is concerned that "a payment may be both a gift nontaxable to the recipient and a business expense deductible by the payor" (Petition for Certiorari in *Duberstein*, pp. 10-11). The Government further points out that the problem in these cases "cuts across the whole field of business gifts to individuals, *e.g.*, severance pay, pensions, widow bonuses, employee bonuses, tips, Christmas gifts to buyers, finder's fees, reference fees to lawyers, kickbacks, etc.," in which the "payments are frequently large." *Id.*, at 19.

Strike relief can hardly be deemed to fall within the field of corporate and business transactions of the sort which concern the Government. However, it seems to us that not only does the present gratuity test fully meet the Government's income tax needs even in these business areas, but that the very breadth of the field in which the gratuity test has its application counsels against its replacement by a far more difficult subjective donor motivation test.

gift is denying the Government opportunity to tax transactions which are in fact compensation. We submit that coming so late in the day, the Government's request for a reformulation of the ground rules concerning the measure of gift under the Code is more appropriately addressed to the Congress than to this Court.

(iii) Nor would it avail the Government anything if, contrary to the demonstration just made, the donor's economic motive or lack of charitable intention should be held to negate the gift exemption; for in this case it is clear that concern for needy workers rather than expectation of business benefit to the union underlay the International Union's distribution of strike relief.

The Government recognizes, of course, that strike relief given only to needy persons meets the *prima facie* indicia of a gift. But it seeks to overcome this *prima facie* case by a tortuous distillation of economic return benefit to the union from the granting of strike relief. The Government works out its theory like this: the bulk of the strike relief funds was made available by the International Union, the strike was requested by the International Union, the continuation of the strike benefited the International Union, the strike relief facilitated continuation of the strike —ergo, the strike relief could not be a gift because it was made with expectation of return benefit to the donor (Gov. Br. 24-25).

The Government's chain of reasoning breaks at every significant point: The International Union did not request the strike; the strike was not called or continued for the benefit of the International Union; strike relief did not facilitate the continuance of the strike; and in any event, the relief simply was not given by the International in expectation of any return economic advantage. As we earlier demonstrated (*supra*, p. 3), the strike was neither

called at the request of nor for the benefit of the International Union which supplied the strike relief. The strike was called by a secret ballot of the members of the Local at Kohler for their own benefit. The primary link in the Government's "self-interest" argument thus breaks at the outset.

Nor has there been any showing that strike relief facilitated the continuance of the strike. Actually, in most strikes today, the plant is completely closed for the duration of the strike and the benefit to the union of particular workers remaining on strike is therefore highly conjectural since those who are in need of assistance cannot return to work in any event. And even at Kohler, where some strikers did return to work, there is not a scintilla of evidence that any worker ever considered the factor of strike relief in determining whether to return to work. It is difficult to believe that persons in respondent's situation went or remained on strike because of the availability of bare subsistence food and rent benefits, when their wages at the plant would have been some $100 a week.

On this record it is clear that the International Union did not request the strike, that the strike was not called or continued for its benefit, and that the relief conferred did not demonstrably facilitate the strike's continuance. Even assuming, however, that the relief worked to the economic advantage of the International Union which was providing the bulk of the relief funds, nevertheless it seems clear that such highly conjectural return advantage was merely an incidental byproduct, not the actual purpose of the International's strike relief distribution. Need and need alone was the measure of and the reason for the relief benefits conferred. Even were the Government correct in its contention, which we contest, that donor self-interest alone will defeat the gift status to the recipient of benefits

gratuitously bestowed upon him, strike relief is not a covert form of furthering the business interests of the International but precisely what it purports to be—subsistence relief to needy strikers and their families, bestowed out of charitable considerations.

* * * * * * *

The factual issues concerning the alleged return "consideration" furnished by recipients of strike relief and the supposed union self-interest in making strike relief distributions—the two contentions upon which the Government rests its gift arguments—do not come to this Court for a trial *de novo*. Yet the assumptions of fact in the Government's brief are marked by an obvious absence of Record references, for the Government's arguments are not based on the evidence but on its self-serving and *ipse dixit* characterization of union strike relief distributions. Under these circumstances it is hardly surprising that the court below agreed with the jury's special finding which flatly contradicts every one of the Government's assumptions about strike relief. Thus, whereas the jury made a special finding of "gift" after an instruction that "gift" would be defeated "if these payments were made by the Union because of any obligation, either legal or moral . . ." (R.42), the Government nevertheless urges that the benefits were conferred because of a "contractual obligation" (Gov. Br. 17-18, 33-34). Similarly, whereas the jury found "gift" after an instruction that the term "denotes the receipt of financial advantage gratuitously," and "without the payment being made as remuneration for something that the Union wished done or omitted . . ." (R. 43), the Government argues that the strike relief was given not gratuitously, but rather with the expectation of return benefit to the union (Gov. Br. 19, 24-25). And finally, whereas the jury

was repeatedly instructed that a "gift" requires the bestowing of value "only because of personal regard or pity or from general motives of philanthropy or charity . . ." (R. 42-43), the Government continues to urge the absence of such motivating factors in the distribution of subsistence relief to needy strikers.

Not only are the Government's gift contentions premised on propositions of law which are demonstrably erroneous but they necessarily rest upon assumptions of fact concerning the distribution of strike relief which fly in the face of the record and of a special finding by the jury rendered upon instructions of which the Government does not and could not complain under its donor motivation theory. In these circumstances it is submitted that nothing warrants the reversal of the ruling below that the strike relief received by respondent is freed from tax by the statutory gift exemption.

Conclusion

Measured against the established tests and precedents on "income" and "gift", strike benefits clearly do not constitute receipts subject to income tax. Apparently the Government itself recognizes the strength of the ruling to that effect by the court below for it finds itself forced to fall back upon an "equivalence" argument grounded on supposed policy considerations rather than on established tax law (Gov. Br., pp. 44-46). It urges that strike relief should be subject to tax because otherwise some portion of wages earned, which are deducted by employees as a union dues "business expense", are also ultimately distributable as nontaxable strike relief.

The theory of tax equivalence which the Government here puts forward has not met with judicial favor. Thus in *American Dental*, 318 U.S. at 322, this Court held a release of indebtedness to be a tax free gift to the debtor although the indebtedness had earlier been used by the debtor as a tax deduction. As the Eighth Circuit stated in another release of indebtedness case, *Reynolds* v. *Boos*, 188 F. 2d 322, 325-326, in response to the equivalence argument, "there is no such general or blanket principle of tax liability." Indeed, the Commissioner himself does not adhere to the policy of tax equivalence which is here urged upon the Court.[57] Moreover, in the present context the Commissioner's equivalence argument is entirely inappropriate to the case before the Court, for respondent never deducted any union dues as a business expenditure because he had paid no dues.

But the final answer to the Government's proffered equivalence policy is found in the existence of a far more

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[57] Employer premiums on employee group life insurance are not includible in the employees' income though they are deductible by the employer. L.O. 1014, C.B. 2, 88 (1920); Income Tax Regulations, Section 1.61-2(d)(2). And see *supra*, p. 51.

compelling policy *against* the taxation of strike benefits. That policy—which certainly underlies the rulings holding nontaxable retirement, unemployment, Red Cross, public assistance and similar benefits—is the compelling consideration that subsistence relief afforded to the destitute and needy, what has sometime been described as the "poor box", is hardly a proper source of federal revenue. It is a shocking suggestion indeed, one contrary to the most fundamental public policy, that subsistence food and rent to strike-bound workers and their families should be devalued by imposition of a federal tax burden.

It is thus clear that the ruling below is as correct a resolution of competing policy considerations as of decisional law. It is therefore respectfully submitted that the decision below should be affirmed.

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APPENDIX A

TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue

GC:I:JAG:DEM
A-404603

February 13, 1946.

Mr. Leon Henderson
1420 New York Avenue, N.W.
Washington, D. C.

MY DEAR MR. HENDERSON:

Your letter to Honorable Fred M. Vinson, Secretary of the Treasury, dated January 28, 1946, has been forwarded to this office for reply. You request a ruling that contributions to The National Committee to Aid Families of General Motors Strikers, Inc., constitute allowable deductions by the individual donors under section 23(o) of the Internal Revenue Code.

It appears from information contained in your letter and in a supplemental statement filed with the Bureau on February 7, 1945, by Joseph Rauh, Vice Chairman of the Washington Committee, that The National Committee to Aid Families of General Motors Strikers, Inc., was incorporated on January 21, 1946, under the laws of the State of New York, for the following purposes:

> "To come to the voluntary aid of destitute and needy persons, to help them financially and to rehabilitate themselves either directly or in cooperation with other relief and charitable agencies, and particularly to voluntarily aid the families of striking employees of the General Motors Corporations or other organizations who are in destitute and needy circumstances.
>
> "To exercise all the rights and powers provided for by the Membership Corporations Law of the State of New York."

It is stated that the Committee was organized by persons having no connection with the union involved in the strike, and that, in carrying out its purposes, the Committee operates independently of any labor union.

The class of persons to receive assistance will be those persons within the group who are selected by the representatives of the Committee on the basis of actual need and lack of other means of help. The Committee also plans to render assistance to needy families after the strike is settled and before the first wages are received, a period estimated to be about three weeks.

It is stated that the Committee takes no position on the issues in controversy or on the merits of the strike. In its solicitation of funds, it appears that the Committee stresses that its purpose is solely to help families who are in actual need. It is stated that the funds collected will be used to purchase food and other necessities of life for distribution to such needy families or will be distributed among those families for such purposes. It appears that distribution is made through local committees of the National Committee formed in the communities principally affected by the General Motors strike. The local committees are composed of recognized social workers and religious leaders of all faiths in those communities, and those committees pass on the urgency of the cases. It is stated that, due to the large number of persons involved and the insufficiency of funds, only the neediest cases will be given help.

Section 23(o) of the Internal Revenue Code provides that in computing net income there shall be allowed as deductions, in the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

* * * * * * *

(2) a corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scien-

tific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * * * *

limited to an amount which does not exceed 15 percent of the taxpayer's adjusted gross income.

Careful consideration has been given to the information submitted as to the purpose and activities of The National Committee to Aid Families of General Motors Strikers, Inc. Based solely on the foregoing representations made by officers of your organization, if your organization carries on operations in accordance with the provisions of its charter and in accordance with the above representations, it will be considered to be a corporation organized and operated exclusively for charitable purposes, and contributions by individuals to the Committee will be deductible in the manner and to the extent provided in section 23(o) of the Internal Revenue Code.

Very truly yours,

/s/ JOSEPH D. NUNAN,
Commissioner.

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